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BRIEF FOR PETITIONERS

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 162.

LENA M. SLATER, W. F. SLATER, JESSE R. SLATER, ANNIE E. SLATER, AND HENRY G. SLATER, PETITIONERS,

vs.

THE MEXICAN NATIONAL RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 6, 1902.
CERTIORARI AND RETURN FILED JANUARY 19, 1903.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

This is an action to recover damages for injuries resulting in death, caused by negligence. The suit was instituted by Lena M. Slater, on the 17th day of November, 1900, in the Circuit Court of the United States, for the Western District of Texas, at Laredo. The plaintiff seeks to recover for herself, as surviving wife; and, as next friend, for William F., Jesse R., Annie E. and Henry G. Slater, minor children of herself and her deceased husband, William H. Slater. (Record, page 2.)

The death, out of which the alleged damages arose, resulted from injuries occasioned in the State of Tamaulipas, one of the States of the Republic of Mexico, alleged to have been caused by the negligence of the defendant, the Mexican National Railroad Co. A trial by jury on March 20th, 1901, resulted in a verdict in favor of plaintiffs for seven thousand dollars, apportioned as follows:

To Lena M. Slater	$2,691 00
To William F. Slater	453 00
To Jesse R. Slater	717 00
To Annie E. Slater	1,346 00
To Henry G. Slater	1,793 00

The plaintiffs are citizens of the State of Texas, residing in Webb county, Texas; and the defendant corporation, a citizen of the State of Colorado, having been created under the laws of that State. (Record, page 20.)

The question involved is: What construction will the courts of this country place upon the laws of Mexico relating to actions of the character stated?

PETITIONERS' BRIEF.

To maintain the judgment of the trial court, petitioners submit the following:

FIRST PROPOSITION.

Under the laws of Mexico, a clearly defined right of action exists for damages arising from injuries resulting in the death of a person, against the person whose negligence was the proximate cause of such injuries, there being no contributory negligence on the part of the person injured; such action lies in favor of the surviving wife and minor children of herself and her husband, whose death so resulted.

STATEMENT.

The petition was in usual form until it reaches the ninth paragraph, and then it proceeds as follows:

IX. Plaintiffs further allege that by the laws of Mexico which now exist and existed and were in force at the time and place of the happening of the killing of William H. Slater through the defendant's negligence, as aforesaid, they the plaintiffs, have had the right of action against the defendant for their damages, and they say that the following were, and are now, the laws of Mexico, applicable to this case, out of which the said right of action grew, and by virtue of which the same now exists in the said Republic of Mexico, to-wit:

From the Federal Constitution of the Mexican United States:

"Art. 72. Congress has power * * * (22) To enact laws governing the general lines of communication, and governing postoffices and mails."

"Art. 97. The Federal Courts has jurisdiction; (1) Of all questions growing out of the execution and application of the Federal Laws, except when the application of the law only affects interests of individuals, in which case the local Judges and Tribunals of the State shall entertain jurisdiction."

From the Penal Code of Mexico.

"Art. 4. A crime is a voluntary infraction of the penal law, doing that which it prohibits, or neglecting to do that which it commands.

"Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

"Art. 6. There are intentional crimes, and crimes resulting from neglect.

"Art. 11. Negligent crimes exist: (1) Where an act is done, or a duty omitted, which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against the consequences, through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions or through unskillfulness in any art or science, the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * * (3) Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved; if the accused is ignorant of such circumstance, through not having previously made the investigation which the duty of his profession or the importance of his case demands."

Pen. Code Bk. 2. "Civil Liability in Criminal Matters."

"Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses.

"Art. 304. Reparation comprehends: Payment of all damages caused to the injured party, his family or a third person for the violation of a right which is formal, existing and not simply

possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, a proximate and inevitable consequence.

"Art. 305. Indemnization imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act of omission by which a formal, existing and not merely possible right is attacked, and for the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

"Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have accrued; if they proceed directly from, and a necessary consequence of, the same act or omission from which resulted the previous damages or injuries.

"Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding and to avail himself of his rights in such proceeding or in the civil suit.

"Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

"Art. 309. The Judges who adjudicate upon the civil responsibility shall be controlled by the provisions of this title, in so far as its provisions extend; on other questions, they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility.

"Art. 310. The right to civil responsibility forms a part of the estate of a decedent and descends to his heirs and successors, provided it be not the case of the following article, or that it arise from injury or defamation, and that, the offending person having been able in the life-time to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

"Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belong exclusively to the persons named at the end of article 318 as directly damaged. Consequently such action forms no part of the estate of the deceased, nor is it extinguished, although the latter pardon the offense in life.

"Art. 318. The civil responsibility that grows out of a homi-

cide done without right (or justification) comprehends the payment of the indispensible expenses of the burial of the body, the expenses and necessary charges made for the cure of the deceased, the damages that the homicide causes to the property of the deceased, and of the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave.

"Art. 319. The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide had not killed him, and that time shall be calculated by the Judges according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule the obligation shall cease: 1. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2. When those beneficiaries get married. 3. When the minor children become of age. 4. In any other case in which, according to law, the deceased, if alive, would not be required to continue the support.

"Art. 320. In order to fix the amount which should be given as the measure of support, the ability of the party responsible for the killing shall be taken into consideration and the necessities and circumstances of the persons entitled to receive it."

"Art. 325. * * * Table of mortality and expectancy of life:

A 10	Corresponded	40.80
" 15	"	37.40
" 20	"	34.26
" 25	"	31.34
" 30	"	28.52
" 35	"	25.72
" 40	"	22.89
" 45	"	20.05
" 50	"	17.23
" 55	"	14.51
" 60	"	11.05
" 65	"	09.63
" 70	"	07.58
" 75	"	05.87
" 80	"	04.60
" 85	"	02.00

Federal Civil Code, Chap. IV.

"Art. 205. The obligation to give support is reciprocal; he that gives support has at the same time the right to ask it.

"Art. 206. Married people in addition to the general obligation imposed by matrimony, have that of giving support in cases of divorce and others designated by law.

"Art. 207. Fathers are obliged to support their children. If it should be impossible for parents to do so, or should they be unable to do so, the obligation falls upon other ascendants by both lines of ascendancy who are nearest of kin.

"Art. 208. The children are obliged to give support to their parents. If it is impossible for the children to do so, or they are unable to do so, then those descendants next in kin are obliged to do so.

"Art. 211. The support comprehends eating, dress, habitation and assistance in case of sickness.

"Art. 212. In regard to minors support it comprehends in addition to the necessary expenses for the primary education of the party entitled to support, and to furnish him some calling, art or profession, honest and adequate to his sex and personal circumstances."

"Art. 214. The support should be proportioned according to the abilities of those who have to give it, and the necessities of those who have to receive it."

"Art. 220. The assurance of the support may consist in a mortgage, bond or deposit of sufficient amount to cover the support."

"Art. 225. The right to receive cannot be renounced nor is it an object of transfer or assignment."

Pen. Code, Bk. 2.

"Art. 313. The Judges who take cognizance of suit based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following articles shall be observed: * * *

"Art. 321. In case of blows or wounds, from which the injured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay all his expenses of cure, the damage he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do the work by which he subsists. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds.

"Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which [he] shall recover, and can properly devote himself to other and different work, which may be lucrative and appropriate to

his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his liability to earn in his new employment falls short of his daily earnings in his former occupation.

"Art. 323. If the blows or wounds cause the loss of any member, not indispensible for work, or the person wounded or struck remain otherwise crippled, lame or deformed, by that circumstance he shall have the right not only to the damages and injuries, but also to the sum which the Judge may determine as extraordinary indemnity, considering the social position and sex of the person and part of the body remaining crippled, lamed or deformed.

"Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.

"Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under a disability to work.

"Art. 326. No person shall be charged upon a civil liability upon an act or omission contrary to a penal law unless it be proven; that the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

"Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability."

"Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the act or omissions of the clerks or servants causing the liability shall occur in the service for which they were employed.

"Art. 331. Under the conditions of the preceding article, those liable are * * * railroad companies."

"Art. 363. Limitations: The various actions by which civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked shall be extinguished according to the terms and in the manner provided by the civil code of the com-

mercial code, according to the nature of the demand and the subject-matter treated of.

"Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution, but for reparation of damages, for indemnity for injuries, or for the payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

"Art. 365. A pardon shall in no case extinguish civil responsibility nor the action to enforce it, nor the legal rights which third persons may have acquired.

"Art. 366. Limitation is interrupted by criminal proceeding until final judgment is pronounced. This done the term of limitation commences to run anew."

Transitory Law: Pen. Code.

"Art. 26. Until it is determined in the new code of procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * (5) Actions to enforce the civil liability may be brought before the court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending the proceeding in the former shall be stayed."

From the Federal Civil Code.

"Art. 9. Against the observance of the law, disuse, custom or practice to the contrary cannot be alleged."

"Art. 20. When a judicial controversy can be decided neither by the text nor the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case.

"Art. 21. In cases of conflict of rights and the absence of express law for the special case, the controversy shall be decided in favor of him who seeks to avoid damages, and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights, or rights of the same specie, it shall be decided by observing the greatest equality possible between the parties."

"Art. 1095. Limitation bars in three years * * * (8) Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals,

and which the law imposes upon the representatives of such persons or the owners of the animals."

Act of Congress of December 15, 1881.

"Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which may in the future be constructed, upon Mexican territory, according to the following basis: (1) Railroads, telegraphs and telephones which in the Federal District and territory of Lower California unite together two or more municipalities, or Federal District and territory of Lower California with one or more States; those which communicate two or more States with each other; those which touch any point in the territorial boundary line of the republic and foreign countries, or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction 22 of article 72 of the constitution. (2) These general lines of communication and their branches shall be subject exclusively to the federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * * (g) Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operation of the lines. (h) Security of the same works for which the companies, through delays or obstructions, carelessness or fault in the service or for accidents or mishaps in the operation."

From the Regulations for the Construction, Maintenance and Operation of Railroads.

"Art. 52. The coaches and cars which enter into the makeup of a train shall have draw-heads of the same height, so that their centers will be opposite to each other.

"Art. 53. No car of whatever kind shall form a part of the make-up of a train, unless the same shall have been previously inspected very carefully."

"Art. 99. The company shall be responsible for the moving of all trains on its road."

"Art. 184. Companies (railroad) are liable for all faults and accidents which occur through tardiness, negligence, imprudence or want of capacity of their employes."

"Art. 208. All violations of this law which companies (railroad) commit shall be subject to punishment by the administration of a fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individ-

uals through indemnity and the liabilities which the companies may incur through criminal acts or omissions committed by them."

Plaintiffs further allege that by reason of the general statutes of the State of Texas and by virtue of general principles of right and justice and of the laws of Mexico hereinbefore mentioned, they had and now have a right of action for their damages against (the defendant) in the Republic of Mexico, and the same now exists the defendant in the Republic of Mexico, and the same now exists in said country as well as in the State of Texas, and in the United States of America. And they say that the acts of negligence upon the part of the defendant, its agent, servant and employes were wrongful and actionable as has been hereinbefore shown by the plaintiff in the Republic of Mexico at the time of the killing complained of, and are now so, and they say that the same were then and are now wrongful and actionable in the United States of America, and in the State of Texas. And plaintiffs say that by reason of the negligent killing of the said William H. Slater, they have suffered damages in the sum of thirty thousand dollars ($30,000.00).

Wherefore, premises considered, plaintiffs pray that defendant be cited to answer this petition and that they have judgment for their said damages and that said damages be apportioned among the plaintiffs as they may be found to share therein, and that they have judgment for all costs of suit and for general and special relief. (Record, pages 4-11.)

The defendant demurred on the following ground:

Now comes defendant and says that the allegations in plaintiff's petition are wholly insufficient to require further answer of this defendant, and of this it prays judgment of the Court.

1st. And specially excepting defendant says that it affirmatively appears from the petition of the plaintiff that the wrong charged to have resulted in the death of Wm. H. Slater occurred in the Republic of Mexico and not within the jurisdiction of this Court.

2nd. That it affirmatively appears from the allegations of said petition that the laws of Mexico, where the wrong is alleged to have occurred, are not similar or analogous to the laws of Texas, but that the same are dissimilar and different to the laws of Texas, in this, that under the laws of Mexico, plead by plaintiffs in said petition, the parties entitled to institute and maintain suits for wrongs resulting in death, are not the same as in Texas; and in this, that they are dissimilar in many other respects made

obvious by an explanation of the laws of Mexico plead by plaintiffs; and in this, that under the laws of Texas, it is provided that in order to authorize a recovery for the death of another that the wrongful act, negligence, carelessness, unskillfulness or default causing the death of another must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury, whereas there appears no such limitation upon the survivor under the laws of Mexico; upon the contrary, it appears that a cause of action in favor of certain named persons would exist, notwithstanding the injured person during life has extinguished said cause of action; and in this. that under the laws of Texas, in like cases, the recovery would be "in solidum," while under the Mexican laws plead such a recovery is not intended or contemplated, but must be in install ments not to exceed the amounts contributed by the deceased during life in support of the beneficiaries or persons entitled to be supported by the deceased.

3rd. And especially further, plaintiff's petition affirmatively shows that plaintiff's right to recover damages in Mexico, if any, depends wholly upon an infraction of a penal statute of the Republic of Mexico; that to authorize a recovery under the laws of Mexico this Court must find the act or omission charged to be a violation of the penal code of Mexico, portions of which are set up in plaintiff's petition; that said laws have no extra-territorial effect, and this Court has no jurisdiction to determine such matters, or to adjudge damages based upon a penal statute of a foreign government.

4th. And for further exception, it does not appear that said cause of action is by all parties authorized under Mexican law to maintain an action for recovery of damages, nor does it appear for the use of all persons, that might be entitled to recover damages for the wrongful killing of another, but is for the sole use of the wife and children not negativing the existence of others entitled to recover under the Mexican law, and is therefore not authorized by the Texas statute, but is in direct violation thereof, and if entertained would subject defendant to a multiplicity of suits, contrary to the well established policy of Texas.

5th. And for further exception defendant says, the laws of Mexico, as plead, are so unlike and dissimilar to the laws of Texas that this Court should not undertake to administer the same under the doctrine of national or interstate comity.

Of all of which defendant prays judgment of the Court. (Record, pages 12-13.)

These demurrers were overruled (Record, page 13), and, by

amendment, the defendant, on March 18th, 1901, excepted further, and pleaded as follows:

Now comes the defendant Mexican National Railroad Company, by its counsel, and after leave of Court first had amends its original answer filed herein on December 4th, 1900, and for and in lieu of said answer makes and filed this its first amended original answer, as follows:

1st. In addition to the general and special exceptions heretofore urged to plaintiff's petition, defendant excepts to said petition, because it affirmatively appears from said petition that the said....., who sues, has a husband upon whom she is dependent for a support, and that therefore she is not entitled to recover in this suit, of which defendant prays judgment of the Court.

2nd. Defendant excepting further says that it affirmatively appears from plaintiff's petition that the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is, therefore, so dissimilar from the laws of Texas and of the common law that this Court can not administer or enforce said laws and rights.

And of this defendant prays judgment of the Court.

Comes defendant again, not waiving its plea to the jurisdiction, but specially urging the same, as well as its general and special exceptions, and in the event that this Court shall overrule its said plea and exceptions, denies all and singular the allegations in said petition contained and demands strict proof thereof, and of this defendant puts itself upon the country.

And for further plea in this behalf, defendant shows that this Court should not undertake to exercise its jurisdiction, if any in fact exists, which defendant denies, to adjudicate upon the laws of Mexico, set up as a basis of the damages sought to be recovered, because the laws are unlike and dissimilar to the laws of Texas, in this, that the right secured under the laws of Mexico to certain representatives of deceased persons to recover damages, to-wit: of surviving husbands, wives, mothers, fathers and children is the right of alimony or pensions, to be paid monthly and by installments, which right ceases whenever the necessity for alimony or support no longer exists, such as a change of fortune, marriage of the surviving wife and daughters and when the boys arrive at the age of 21 years, which right and cause of action secured under the laws of Mexico is contrary to the public policy of Texas, as the laws of Texas have provided no remedy for the enforcement of such a right, and, therefore, our Courts, neither in law or in equity, have the power and authority to create a rem-

edy for the enforcement of such a right, and of this defendant prays judgment of the Court and puts itself upon the country.

And again comes defendant and shows that the laws of Mexico as pleaded, when construed in connection with other provisions of the Mexican laws securing a right of recovery in surviving wives, mothers, fathers, husbands and children, for personal injuries resulting in death, to-wit: Arts. 211, 212, 213, 214, 217, 221 and 224 of the Civil Code of the Federal District, and of Arts. 1376 and 1377 of the Code of Civil Procedure, the laws of Mexico that govern, secures a right of alimony, or in the nature of a pension, and therefore secures a right of recovery unknown to the laws of Texas and for the enforcement of which no law of Texas or of the United States has been provided, and therefore this Court has no jurisdiction to grant the relief prayed, and of this defendant prays judgment and puts itself upon the country.

And for further answer in this behalf, defendant shows that plaintiff ought not to have and maintain their action because at the time of the accident in which William H. Slater was injured and for a long time anterior thereto, he, the said William H. Slater, was in the employ of defendant company as a brakeman, and that the injury he suffered was the direct and proximate result of his, the said William H. Slater's own negligence and carelessness in the performance of his duty as such brakeman, and of this defendant puts itself upon the country. (Record, pages 14-15.)

In replication to the amended answer, plaintiffs filed their supplemental petition as follows:

Now comes plaintiffs by leave of Court and files this their first supplemental petition in replication to the first amended original answer of defendant, filed on March 18th, 1901, and demurs to the matters and things therein pleaded because the same constitute no defense to the cause of action.

And especially because the laws referred to relating to alimony and person, viz.: articles of the Civil Code mentioned, are provisions of the laws of Mexico regulating matters growing out of the marriage relation, involving the duties and obligations of parties to the marriage contract and of parents and children; and such provisions do not show a material or substantive difference, or any difference between the laws of Texas, of the United States and Mexico, as to the nature of the right of action claimed by plaintiffs to exist under the laws of Mexico; nor do such provisions show or tend to show that the laws of Mexico on the sub-

ject of damages for injuries resulting in death are contrary to the public policy of Texas or of the United States.

And further excepting specially, because the provisions of the laws referred to, viz.: Arts. 1376 and 1377, Code of Procedure, relate to a proceeding for the purpose of obtaining a decree for temporary alimony and in no sense can they be the foundation for a defense to the action.

And of this defendant (plaintiff) prays judgment of the Court. (Record, pages 15-16.)

In aid of the exceptions contained in the supplemental petition, plaintiffs filed as exhibits "A" and "B," the following:

EXHIBIT "A."

Chapter IV, of Book I, Title V—Concerning Alimony.

Art. 205. The obligation to furnish alimony is reciprocal, the one who furnishes alimony has in his turn the right to demand it.

Art. 206. Parties to the marriage contract, in addition to the general obligation which the marriages imposes, are bound for alimony in cases of divorce and in other cases provided by law.

Art. 207. Parents are bound to give alimony to their children. If there be no parents or they be not able to give alimony, the obligation falls on the other relations on both sides in the nearest ascending grade.

Art. 208. Children are bound to give alimony to their parents. If there be no children, or if they are not able to give alimony, the nearest relations in the descending grade are bound.

Art. 209. If there be no relations in the ascending or descending grade, or if they are not able to give alimony, the obligation falls on the brothers and sisters of both parents; on those of the mother alone, if there be none of the father, and on those of the father if there be none of the mother.

Art. 210. Brothers and sisters are bound to give alimony to their younger brothers and sisters only until they are 18 years of age.

Art. 211. Alimony comprehends food, clothing, dwelling place and attendance in sickness.

Art. 212. Respecting minors, alimony includes in addition, the expenses necessary for the primary education of the dependent, and to prepare him for some occupation, art or profession, honest and suitable to his sex and personal circumstances.

Art. 215. The one bound to supply alimony fulfills his obliga-

tion by assigning a pension sufficient to support the dependent, or by taking him into his family.

Art. 214. Alimony should be in proportion to the estate of the one bound, and to the necessities of the one who receives it.

Art. 215. If the obligations to receive alimony falls upon several, and all are able to give, the judge shall apportion the amount among them according to their means.

Art. 216. If only some of these are able, the amount of alimony shall be apportioned among them, and if one only shall have the means he alone shall comply with the obligation.

Art. 217. The obligation of supplying alimony does not include that of endowing the children, nor that of providing them with capital to prosecute the business, are [art] or profession for which they may have been fitted.

Art. 218. The right to demand that alimony be made secure exists in favor of : I. The person entitled to alimony. II. The relative in ascending grade who may have him (the person entitled thereto) under his parental control. III. The guardian. IV. The brothers and sisters. V. The public department.

Art. 219. If the person who demands security of alimony in the name of the minor, cannot and does not wish to represent him in Court, the Judge shall appoint a temporary guardian.

Art. 22 [220]. The security may consist of a mortgage, bond or deposit of an amount sufficient to cover the alimony.

Art. 221. The temporary guardian shall give security for the annual value of the alimony. If he should control any fund designated for that purpose he must give legal security for it.

Art. 222. Where the father enjoys the use of the property of the child, the value of the alimony shall be deducted from it (the income) if it is sufficient to cover it (the alimony). On the contrary, where the income is not sufficient the difference shall be (a charge) on account of the father.

Art. 223. If the necessity of the dependent proceeds from bad conduct the Judge, having knowledge of the cause, may diminish the sum fixed as alimony, placing the one at fault, if necessary, under care of competent authority.

Art. 224. The obligation to supply alimony ceases: I. When the one bound lacks the means of compliance. II. When the dependent is no longer in need of alimony.

Art. 225. The right to receive alimony cannot be renounced, nor can it be subject to compromise between the parties.

EXHIBIT "B."

Chapter 11, of Book 111, Title 1.

Civil Procedure. *Temporary Alimony.*

Art. 1372. In order to decree temporary alimony to one who has the right to exact it, it is necessary:

I. To make complete proof of the right under which it is asked.

II. To prove proximately at least, the means of the one who should give alimony.

III. To make sufficient proof of the urgent necessity for temporary alimony.

Art. 1373. The proof required under paragraph 1 of the preceding article shall be the last will, the contract or executory instrument which contains the obligation to give alimony; the contract will have to be in from of a public writing.

Art. 1374. When alimony is asked on the ground of consanguinity, the documents should be presented which prove the interested party to be within the cases provided in article 207 to 210 and 3324 and articles of the civil code relating thereto.

Art. 1375. When husband or wife asks alimony, the act or certificate of marriage must be presented.

Art. 1376. After compliance with the provisions of the preceding articles, the Judge, if he believes the right has been established, shall designate the amount of alimony and shall adjudge it, directing it to be secured months in advance in all cases.

Art. 1377. Immediately on adjudging temporary alimony, the first monthly payment shall be exacted of the one liable for it. (Record, pages 16-19.)

It was agreed that the translations of the laws of Mexico, pleaded by plaintiffs and defendant were correct, and are the laws of Mexico having application to this case. (Record, page 19.)

The demurrers of defendant were overruled; those of the plaintiffs were sustained; and the case went to the jury under the evidence and the charge of the court, resulting as before stated. (Record, page 20.)

Remarks.

We believe the law is correctly stated by the learned Judge

of the U. S. Circuit Court of Appeals, rendering the opinion in this case, wherein it is held that a cause of action is given under the laws of Mexico here under consideration; for, thus it is stated in the opinion of the court: "The statutes of Mexico creating the "plaintiffs' right, place the acts and omissions, charged against the "defendant to support their claim of right, in the class of negli- "gent crimes; but it cannot be contended that the act belongs to "that class of criminal laws which can only be enforced by the "courts of the country where the offense was committed, for it "gives a civil action to recover damages for a civil injury." (Record, page 89.)

SECOND PROPOSITION.

The civil action for damages for injuries resulting in death, under the laws of Mexico, is a personal action, transitory in its nature; and the right created by those laws not being contrary to the public policy of the State of Texas, nor calculated to injure the State of Texas, or the United States, or their citizens, the same may be enforced at law in the Federal courts within the State of Texas—and in this suit, where, by personal process and an appearance, the wrongdoer has been subjected to the jurisdiction of the court.

STATEMENT.

The citizenship of the parties is diverse. (Record, page 2.) The defendant corporation appeared and filed its pleas. (Record pages 12 and 14.)

AUTHORITIES.

Dennick vs. Railway Co., 103 U. S., 11.
Railway Company vs. Cox, 145 U. S., 593.
Railway Company vs. Babcock, 154 U. S., 190.
Huntington vs. Attrill, 146 U. S., 670.
Stewart vs. B. & O. Ry. Co., 168 U. S., 445.
B. & O. Ry. Co. vs. Joy, 173 U. S., 226.
Evey vs. Mexican Central Ry. Co., 81 F. R., 294.
Mexican Central Ry. Co. vs. Marshall, 91 F. R., 933.
Story on Conflict of Laws, Sec. 625, note "a."

Cooley on Torts (as to damages recoverable), page 270 *et seq.*

Texas Revised Statutes, Tit. 57, Arts. 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027.

Ry. Co. vs. Haist, 72 S. W. Rep. (Ark. Sup. Ct.), 893, and authorities there cited.

REMARKS.

As to the power and duty of the court to hear and determine a controversy or cause of action arising under the laws of another country, it being a transitory action and not against the policy of this country, there is no question.

The court inquires, not whether the laws are similar or unlike, but whether the policy of this country forbids the enforcement of the right. It has been announced as the true rule, that "whether the domestic law provides for redress in like cases "should in principle be immaterial, so long as the right is a rea- "sonable one, and not opposed to the interests of the State." (Story Con. Laws, Sec. 625, note "a.")

Under the decisions of our courts, an action for damages for injuries resulting in death is not purely a statutory action. It is founded on the negligent act causing death, which is a tort in itself, the act of negligence being in itself wrongful, and not so by virtue of statutory enactment. Under the common law a remedy for the loss was given; but the damage was measured by the pecuniary loss causing incidental damages suffered, such as expenses for medical attendance, care and nursing for the time intervening between the injury and the death. (Cooley on Torts, page 262.) The relief thus afforded was inadequate, until the passage of Lord Campbell's Act, the purpose and effect of which was to remove the obstacle to recovery of damages for that "which "is essentially and in its nature a tort."

In Stuart vs. B. & O. Ry. Co., 168 U. S., 445, it is said: "Where the statute simply stakes away the common law obstacle "to a recovery for an admitted tort, it would seem not unreasona- "ble to hold that an action for that tort can be maintained in "any State in which that common law obstacle has been removed. "At least it has been held by this court in repeated cases that an

"action for such a tort can be maintained where the statute of "the State in which the cause of action arose is not, in substance, "inconsistent with the statutes or public policy of the State in "which the right of action is sought to be enforced." (Citing Ry. Co. vs. Cox, 145 U. S., 593, 605; Dennick vs. Ry. Co., 103 U. S., 11; Huntington vs. Attrill, 146 U. S., 657; Ry. Co. vs. Babcock, 154 U. S., 190.)

Arts. 11, 301, 304, 305, 311 and 318, of the Penal Code of Mexico remove the obstacle in the way of redress for the loss occasioned by the death of a person caused by the negligence of another, and enable the surviving wife and children to recover damages for such loss. By Article 318 (Record, page 6), expenses incurred in attending the injured person prior to his death, funeral expenses, injury to his property and the support for the wife and children, of which they have been deprived, are all made elements of damage; and Article 304 (Record, page 5) contemplates the payment of all damages caused to the family of the injured party, if such damages are actual and arise directly and immediately from the act or omission complained of. It would seem, therefore, that the laws of Mexico, in specifying certain elements of damage, are not contrary to the policy of the State or the United States, and that, under the laws of each country, the measure of damage is a just and reasonable compensation for pecuniary loss.

THIRD PROPOSITION.

Damages for injuries resulting in death, the payment of which may be exacted from a railroad company under the laws of Mexico, is not alimony in the statutory meaning of that term; but, the support of which the wife and children have been deprived may be considered with other facts in determining the amount of the damages occasioned, and payment of such damages may be enforced in the courts of law of this country without reference to the procedure under the code of Mexico to enforce the payment of alimony.

REMARKS.

In the Civil Code of Mexico, Title V treats of subjects growing

out of the marriage relation; and Chapter IV, of such title, treats of *Alimony,* or in other words, declares the reciprocal obligations of husband and wife, of parent and child, to furnish alimony; while Chapter I, of Book III, Title I, Civil Procedure of Mexico, prescribes the manner of enforcing that obligation. (Record, page 16-19.)

Alimony may mean support—but the term support does not always mean alimony. The latter, as defined by Bouvier (as well as by the laws of Mexico, in substance), is the allowance which a husband by order of court pays to his wife, living separate from him, for her maintenance—the former, in common parlance, is a maintenance with provisions and the necessary means of living.

Article 205, of Chapter IV (Record, page 16), makes the obligation to furnish alimony reciprocal; and if such is the nature of the obligation cast upon a railroad company through its fault or negligence, then, under such provision of law, there must be reciprocity as to the obligation, between the railroad company and those entitled to alimony.

If other persons are also liable for alimony and are able to respond, then, under Articles 215 and 216, of Chapter IV (Record, page 17), the amount of alimony to be furnished must be apportioned among those liable, according to their means. These features of the law argue the unreasonableness of the contention that such damages, for which a railroad company is liable, is alimony in the statutory meaning of that term, and that the only mode of recovery of such damages, available to the surviving wife and children is the procedure provided for the recovery of alimony.

If it be shown, however, that damages for injuries resulting in death are to be collected as alimony or pension under the law of Mexico, it does not follow that our courts must adopt the same method of enforcing the right; and our courts should not refuse relief on the ground merely that the procedure for collecting such damages under our laws, may not be the same as that provided by the laws of Mexico; nor does it follow that substantial relief may not be afforded in our courts.

Considering, however, in argument, that damages under the

law of Mexico is alimony or pension, why may not a judgment *in solido* be rendered in our courts for the present value or equivalent of the amount of alimony recoverable under the law of Mexico? For, it is provided in Article 220 of the Chapter on Alimony (Record, p. 18) that a deposit may be exacted sufficient to cover the amount payable as alimony. The amount to be thus secured must first be ascertained. This can only be determined by a consideration of the facts and circumstances of the case. If in this case it should appear that the earnings of deceased (fifty dollars per month) were devoted to the support and maintenance of his family and the education of his children, and that such amount would be the alimony which the wife and children should receive, then a deposit or security sufficient to insure six hundred dollars per annum could be exacted under the law of Mexico. Under the same facts, applying our laws and the procedure of our courts, the present value of such allowance may be ascertained from all the facts and circumstances; and a judgment rendered for that value, *in solido*, would be substantially the same relief as that afforded by the law of Mexico—such is the judgment complained of in this case, and the difference in the laws of the two countries would, therefore, seem to lie in the manner of procedure, rather than in the substantial relief afforded.

The learned judge of the Honorable Circuit Court of Appeals who delivered the opinion in this case, in commenting upon the laws of Mexico, says: "We have seen that the foreign law "here involved does not belong to the class of criminal laws "which can only be enforced by the courts of the foreign country. "The right created by those laws is not contrary to the public "policy in the State of Texas, in which State the Circuit Court "to which this writ of error issued is held. Texas Rev. Stats. "(1895), Arts. 3017, 3027. It is not contrary to abstract jus- "tice or to pure morals, nor calculated to injure the State of "Texas or the United States or their citizens. We have already "shown that the Circuit Court has jurisdiction of all of the par- "ties to this action." (Rec. p. 90.) And it may be well said that the Circuit Court has jurisdiction of the subject matter also.

The wife and children are asking for damages—not for alimony. Art. 184 (Record, page 11) of the regulations relating

to railroads, make railroad companies liable for all faults and accidents which occur through the negligence of their employes; Art. 11 (Record, page 5) of the Penal Code, defines the act of negligence out of which the liability for damages will arise; Art. 301 (Record, page 5), of the Penal Code, prescribes the nature of that liability, viz.: making it an obligation (1) for restitution, (2) for reparation, (3) for indemnization and (4) for payment of judicial expenses; Art. 304, and Art. 305 (Record, page 5), of the Penal Code, define reparation and indemnization—the former term being made to include *payment of all damages to the family of the person injured.* Now, will the Court say that the family (the wife and children) may not maintain such action for damages? Can it be justly said that the only remedy is an action for alimony as defined by Chapter IV, of the Civil Code? The substantial relief contemplated by the provisions of the Penal Code mentioned, may be given in our Courts of law. Plaintiffs are citizens of the United States, having a right of action under the law of Mexico; their cause of action is transitory; they seek its enforcement in the forum where the wrongdoer has entered his plea; and the policy of our law has always been *to find and apply a remedy wherever the right of action may be shown.*

FOURTH PROPOSITION.

Contingencies having arisen, under which, according to the law of Mexico, the liability for damages for injuries resulting in death will cease, may be pleaded in abatement, or as matter of defense, the effect of which would be to bar the remedy, rather than to extinguish the right; but, not having arisen, the court would not be called upon to construe the law relating thereto; and while the action might abate, under the procedure of the foreign country, it would not necessarily abate under the procedure of our country.

STATEMENT.

(Arts. 319 and 320, Penal Code of Mexico.) (Record, page 6.)

AUTHORITIES.

B. & O. Ry. Co. vs. Jay, 173 U. S., 226.

REMARKS.

In the case of B. & O. Ry. Co., 173 U. S., 226, the following question was referred to the Supreme Court of the United States: "Does an action pending in the Circuit Court of the United States "sitting in Ohio, brought by the injured person as plaintiff to "recover damages for injuries sustained by the negligence of "the defendant in Indiana, finally abate upon the death of the "plaintiff, in view of the fact that, had no suit been brought at "all the cause of action would have abated in that State?" The answer to this question sustains the contention here made.

The court, in giving a negative answer to the question, say: "It is scarcely necessary to say that the determination of the "question of the right to revive this action in the name of Her- "vey's personal representative is not affected in any degree by "the fact that the deceased received his injuries in the State of "Indiana. The action for such injuries was transitory in its "nature and the jurisdiction of the Ohio court to take cognizance "of it upon personal service or on appearance of the defendant "to the action cannot be doubted. Still less can it be doubted "that the question of the revivor of actions brought in the courts of Ohio for personal injuries is governed by the laws of that "State, rather than by the law of the State in which the injuries "occurred."

In the case cited the contingency of plaintiff's death had actually arisen, and it was sought to apply the law of Indiana—while in the case at bar, none of the contingencies prescribed in the law of Mexico had arisen; and it was not contended that there was not a perfect, subsisting right of action under the law of Mexico; but had any such contingencies arisen after institution of suit, the case cited would indicate the course to be taken, viz.: that the cause proceed to judgment according to the law of the forum.

The Circuit Court of Appeals in this case, however, encountered what appeared to them the barrier to relief, in the limitation relating to the female beneficiaries; and were constrained to hold

that such limitation affects the plaintiffs' right, and contemplates not merely defensive matter available after marriage of such beneficiaries; and that while a jury might be able fairly and justly to assess in a lump sum the value of the right secured to the male beneficiaries, yet this could not be done in the case of females, because no human intelligence can tell when a woman is going to marry.

It may be a difficult question—so it is, also, to determine how long a man or woman will live. Mortality tables do not answer it. Present conditions of health, habits of living, and other circumstances may be considered in order to reach a conclusion. The conclusion reached, however, cannot be said to be certain—unless it may be regarded as fixed in cases where sentence of death is passed, and even then, sometimes the victim outlives the period of life allotted. Marriage, as to the probable time of its consummation, is no more uncertain than the time when death will occur—the jury, in the light of all the circumstances, aided by their general knowledge and experience, can fix the probable date of the one, as well as they can arrive at the approximate time of the other.

The case of Railway vs. Kuehn, 70 Texas, 382, which is cited in the opinion to support the proposition: "That pending the suit the widow married again does not preclude her right of "action," is not against the contention here made. For in that case Walker, judge, rendering the opinion, says: "The fact" (her marriage) "doubtless affected the verdict, as it gave her less "damages than were given to each of the children." If the actual fact of marriage may be properly considered in fixing the amount of damages, then, also, may the probability or possibility of future marriage, whether remote or otherwise, be so considered.

FIFTH PROPOSITION.

The exclusion of the testimony of Emelio Velasco, if error, was not prejudicial—the testimony was merely cumulative; and wherein it was a mere opinion and did not show how the courts of Mexico had, at any time, construed the laws of that country applicable to the issues raised in this suit, it was inadmissible.

REMARKS.

Notwithstanding the exclusion of the testimony of the witness, the Honorable Circuit Court of Appeals gave it all consideration, as if it were all the evidence available. It might be shown by other distinguished lawyers of Mexico that in some of the States of Mexico, alimony, of which Mr. Velasco speaks, is recoverable either at stated periods, or in one fixed amount. Had the trial court admitted the testimony of Mr. Velasco the adverse party would have been accorded the right to offer testimony in rebuttal. If the foreign law must be established by evidence like any other fact, the right of parties to adduce evidence of the fact to be established should not be cut off by closing the door against them.

The evidence of Mr. Velasco, however, in so far as it is merely cumulative, worked no prejudice to either party to the trial; but wherein it is the mere expression of opinion, not as to what the law is, but as to what construction should be placed upon it, rather than as to how the courts have construed it, is not admissible, and the trial court did not err in its exclusion.

SIXTH PROPOSITION.

As a defense to the action the defendant pleaded that damages prayed for in the case, recoverable under the law of Mexico, was in the nature of alimony or pension, and could be recovered only under the procedure of that country for the recovery of alimony; and that such remedy could not be applied by our courts because of the difference between the laws of the two countries relating to the manner of granting the relief; the proof fails to establish such defense, and the judgment of the trial court should be affirmed

REMARKS.

The statute laws were pleaded and it was agreed that they embraced the law applicable to the case. From plaintiffs' view of the law it was necessary to show that there was a legal obligation resting upon the deceased to support his wife and children. That obligation seemed to be expressed in Chapter IV, of the Civil Code, and for that reason certain articles thereof

were set out in the petition. It was not considered, however, that the right of action for alimony was the only relief obtainable in the courts of Mexico, in view of the fact that, under the provisions of the Penal Code of Mexico, the liability of the wrongdoer was therein fixed, viz.: To pay all damages to the family of the person injured, if shown to be actual, and to arise directly and immediately from the act or omission complained of, or to be such as must necessarily follow from such act or omission as the proximate and necessary consequence thereof. (Art. 304, Penal Code of Mexico.) (Record, page 5.)

These statutes were before the court for construction. The testimony of Mr. Velasco was merely a reiteration of the laws already in evidence; and the trial court felt competent to construe those laws without Mr. Velasco's testimony, it not appearing that he, in any instance, stated what construction had been placed upon them by the courts of Mexico. So now, the question for determination is: Did the trial court correctly construe those laws? If not, what construction should be placed upon them?

Mr. Antonio Martinez de Castro, the presiding member of the commission, charged with the work of preparing the Penal Code of Mexico, prefaces his report to the government, on March 15th, 1871 (which is published with the Penal Code) with an exposition of what he considers the purpose and reason underlying various provisions thereof. Commenting on those relating to civil liability founded on a criminal act, he says: "He who "causes damages and injury, or appropriates property not his "own, is bound to make *reparation* of the former, and *restitution* "of the latter; and in this consists the civil liability.

"To enforce compliance with this obligation, is not only strict "justice, but it is for public benefit; because it tends to repress "the commission of crime, in that his own personal interest will "effectually stimulate the injured party to make known the "crime, and render aid in the prosecution of the guilty party; and "because, as Bentham says, injury not repaired is truly a triumph "for him who causes it."

Mr. Velasco says, alimony shall cease when there is no longer a need—then, if the widow and children can subsist without that service, assistance and care of the husband and father, of which

they have been deprived through the act or omission complained of, they would not be in a position to demand alimony, and could not, therefore, ask the administration of that strict justice of which Mr. Martinez de Castro speaks. Such construction is unreasonable, strained and unjust. The amount necessary for the support of the widow and children may be taken into consideration in estimating the damages they have sustained. When considering that element of damage, along with other elements, the jury may take into consideration, also, such limitations as are consistent with the purpose of the law giving them a right to sue for damages. The defense set up, therefore, was not proven; and in the absence of such proof, the laws of Mexico were properly construed by the trial court.

CONCLUSION.

Upon the foregoing propositions, it is respectfully submitted that the judgment of the Honorable Circuit Court of Appeals of the Fifth Circuit should be reversed; and that of the trial court should in all things be affirmed.

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Petitioners